SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

MAXINE MURRAY, ON HER OWN BEHALF AND AS GUARDIAN AD LITEM OF MAXINE LOIS MURRAY, MINOR, PETITIONER,

vs.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. KALTENBACH CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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[fols. a & b] [Caption omitted]

[fol. 1]

IN SUPERIOR COURT OF KITSAP COUNTY

No. 10433

MAXINE MURRAY, on Her Own Behalf and as Guardian ad Litem of Maxine Lois Murray, a Minor, Plaintiffs,

vs.

JOE GERRICK CO., INDUSTRIAL BROWN HOIST CORPORATION, R. W. Kaltenbach Corporation, F. W. Corning, Irving Gottheim, and Max Bloomenstein, Defendants

COMPLAINT—Filed July 27, 1932

Plaintiffs, for complaint against the defendants, and each of them, allege:

I

That the plaintiff, Maxine Murray, is the widow of Louis Henry Murray, the decedent hereinafter mentioned, and the guardian ad litem of Maxine Lois Murray, a minor, the daughter of the said Louis Henry Murray, deceased, and the plaintiff, Maxine Murray, and brings this action for and on behalf of herself and their said minor child.

II

That the defendant, Joe Gerrick & Co., is a corporation organized under the laws of the State of California and doing and transacting business at Seattle and Bremerton, Washington; that the defendant, Industrial Brown Hoist Corporation, is a corporation organized under the laws of the State of Michigan, doing and transacting business at Seattle and Bremerton, Washington; and that the defendant, R. W. Kaltenbach Corporation, is a corporation organized under the laws of the State of Ohio, doing and transacting business at Seattle and Bremerton, Washington.

[fol. 2]

III

That at Seattle, Washington, on or about the 17th day of June, 1932, Louis Henry Murray entered into the employment of the defendants in the capacity of a constructural steel worker and commenced to work upon a 20-ton steel tower traveling crane within the Puget Sound Navy Yard at Bremerton, Washington, and while so engaged, at about the hour of 11:30 a. m. on June 21st, 1932, fell from said steel crane a distance of about 25 feet, fracturing and crushing his skull and otherwise seriously damaging and injuring his body, from which injuries he died at Bremerton, Washington on the 22nd day of June, 1932, leaving the plaintiff, Maxine Murray, his widow, and the plaintiff, Maxine Lois Murray, his only child, a minor, 3 years of age, surviving.

IV

That the injuries sustained by the said Louis Henry Murray, and from which he died as aforesaid, were caused solely by and through the carelessness and negligence of said defendants, and each of them, as follows:

(a) That the defendants, and each of them, carelessly and negligently failed and neglected to provide the said Louis Henry Murray with a reasonable safe place in which to work and to perform his work at the time at which he was injured and killed, as aforesaid, and as required by Sections 3515-2-3-4 Pierce's Code of the Laws of the State of Washington, which read:

"Sec. 3515-2. 'Place of Work' Defined.—The phrase 'place of work' shall mean and include every place, whether indoors or out, or underground or elsewhere, and the premises appurtenant thereto, where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation directly or indirectly relating to any industry, trade, work or business is carried on, including all construction work."

"Sec. 3515-3. 'Safety,' etc., Defined.—The terms 'safe' and 'safety', as applied to an employment or place of work; 'safeguard' or 'safety device' shall mean such freedom [fol. 3] from danger to the life or safety of workmen as the nature of the case will reasonably permit; and the two latter

terms shall be given a broad interpretation so as to include any reasonably practical method of mitigating or preventing danger."

"Sec. 3513-4. Duty of Employer.—For the purposes of this act, it shall be the duty of every employer to furnish a place of work which shall be as safe for workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions, and to furnish and to use such safety devices and safeguards and to adopt and use such practices, means, methods, operations and processes as under the circumstances, surroundings and conditions are reasonable and practical in order to render the work and place of work safe, and to comply with such standards of safety of place of work and such safety devices and safeguards and such standards and systems of education for safety as shall be from time to time prescribed for such employer by the State Safety Board, or by statute, or by the State Mining Board."

or at all.

(b) That the defendants, and each of them carelessly and negligently failed and neglected to provide, furnish, or use any safety device, or to adopt and use the same as required by said statutes, and failed and neglected to adopt and use such practices, means and methods or operation and processes as under the circumstances, surroundings and conditions as were reasonable and practical in order to render the work and place of work safe, as required by said statutes, or at all.

(c) That the defendants, and each of them, carelessly and negligently allowed and permitted pieces of loosely coiled rope and other debris to lie and remain upon the steel structural beams upon which the said decedent was required to go, walk, and work while performing his work upon said crane.

(d) That the defendants, and each of them, carelessly and negligently caused the structural steel beams and parts of said crane to be heavily covered and painted with red greasy oil lead, making the steel used in the construction of said crane, and upon which said Louis Henry Murray

was required to work, slippery, dangerous and difficult to [fol. 4] hold onto and stand on when working thereon.

(e) That the defendants, and each of them, carelessly and negligently failed to furnish and provide a fit, safe or suitable platform with a railing thereon under, adjacent or close up to where the plaintiff was required to perform his work while "bucking-up" (placing, driving and fastening the rivets through and joining the steel beams and parts of said crane together) so that in case the said Louis Henry Murray lost his balance or hold, or happened to slip or miss his footing while engaged in his work, he could catch hold thereof, step upon or fall upon and thus save himself from falling to the ground, as aforesaid.

(f) That it was the duty of the defendants, and each of them, to furnish and provide a safe and suitable platform of sufficient width, with lines, railing, or other device thereon, for the said Louis Henry Murray to stand upon while performing his work upon said crane at a distance of about 25 feet from the ground, so as to prevent him from falling therefrom; and it was their further duty to direct that said platform be available for use while the said Louis Henry Murray was so working, which said duties the defendants, and each of them, carelessly neglected to do and perform.

(g) That while the said Louis Henry Murray was going about and performing his work upon said crane, as aforesaid, in a cautious and careful manner, he reached for an iron bar with which to hold against a rivet as it was being riveted in place, and while so doing, slipped from a flange on a steel beam on which he was working, and, in attempting to grasp a hold of said beam, he was prevented from so doing by a loose coil of rope lying on top thereof, and, as he fell, he endeavored to grasp ahold of said platform in order to save himself from falling to the ground, but that on account of the same being narrow and carelessly and negligently placed close in to the side of the frame of said [fol. 5] crane at a distance of about 5 feet below where the said Louis Henry Murray was required to work and was without any railing or line thereon to grab hold of, he was unable to grasp the same and was unable to save himself thereby from falling to the ground (a distance of about 25

feet) and sustaining the injuries from which he died, as aforesaid, all on account of the carelessness and negligence of the defendants, and each of them, as aforesaid.

(h) That had said defendants furnished a safe and suitable platform for the said Louis Henry Murray to stand upon in performing his work upon said crane, with the lines, railing or other device thereon so as to protect and prevent the said Louis Henry Murray from falling to the ground while engaged at his work, as required by the aforesaid provisions of the laws of the State of Washington, the said Louis Henry Murray would not have fallen to the ground and been killed, as aforesaid.

V

That at the time of the death of the said Louis Henry Murray he was a strong, young, healthy, active man, 30 years of age, with a reasonable life expectancy of 35.33 years, as shown by the American Mortality Tables, a skilled steel constructural worker, earning and capable of earning a wage of $8.80 per day, of 8 hours, and in normal times of obtaining almost constant employment, and of continuing to earn said sum of $8.80 per day or more for the full period of 35.33 years. That from the time the said Louis Henry Murray fell until the time of his death he suffered extreme and excruciating pain and agony.

VI

That the said Louis Henry Murray left surviving his widow, the plaintiff, Maxine Murray, and the plaintiff, Maxine Lois Murray, 3 years of age, who were wholly dependent upon the earnings of the said Louis Henry Murray for [fol. 5½] their livelihood, and that by his death they have lost their sole means of support and maintenance, his further earnings, accumulations, his foresight and management, and have been deprived of his love, comfort, society, advice, counsel and foresight as a husband and father, and that the plaintiff, in her own right and as guardian ad litem for the said Maxine Lois Murray, have been injured, damaged and sustained a loss in the premises by reason of the carelessness and negligence of the defendants, and each of them, as herein alleged, in the full sum of $27,500.

Wherefore plaintiffs demand judgment against the defendants, and each of them, in the full sum of $27,500, together with their costs and disbursements of this action.

Wm. Martin, Attorney for Plaintiff.

Duly sworn to by Maxine Murray. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 6] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

ORDER APPOINTING MAXINE MURRAY GUARDIAN AD LITEM OF MAXINE LOIS MURRAY—Filed July 17, 1932

This cause coming on for hearing upon the application of Maxine Murray for an order apointing the plaintiff Maxine Murray guardian al litem of the plaintiff Maxine Lois Murray, and it appearing to the Court that the above entitled action is brought by the plaintiff to recover damages from the defendants for alleged negligence causing the death of Louis Henry Murray, the husband of the plaintiff Maxine Murray and the father of said Maxine Lois Murray, and that it is necessary that a guardian be appointed for the purpose of carrying on said action; that Maxine Lois Murray is a minor three years of age and that her mother Maxine Murray, the plaintiff herein, is a fit and proper person to be appointed guardian ad litem for the said Maxine Lois Murray for such purpose.

It is therefore ordered, considered, and decreed that Maxine Murray, the plaintiff, be and she is hereby appointed guardian ad litem of the plaintiff Maxine Lois Murray, a minor, for all purposes of this action, with full authority and power to prosecute such action against the defendant for and on behalf of the said Maxine Lois Murray.

Done in Open Court this 27 day July, 1923.

H. G. Sutton, Judge.

Presented by—

Wm. Martin, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 7] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 2, 1932

Comes now the defendant, Industrial Brown Hoist Corporation, and moves against the complaint herein as foldows:

I

Referring to paragraph IV of the complaint, this defendant moves that the court strike therefrom all of subdivision (a), and each and every part thereof, upon the ground and for the reason that the same is irrelevant, immaterial and has no application whatsoever to the cause of action sought to be alleged in said complaint.

II

Referring to said paragraph IV, this defendant further moves to strike subdivision (b) thereof, and each and every part of said subdivision, upon the ground and for the reason that the same constitutes solely a conclusion of law, and is not an allegation of any fact, and upon the further ground that the same is irrelevant and immaterial and not applicable to the cause of action sought to be alleged in said complaint.

III

In the alternative, and only in the event the foregoing motion II is denied, this defendant further moves that the court require the plaintiff to make said subdivision more [fol. 8] definite and certain by stating therein and specifying particularly the safety device, practices, means, methods and/or processes which the defendants are alleged to have failed and neglected to provide, furnish, adopt or use, or in the alternative to furnish said particulars and specifications by way of a bill of particulars.

IV

Referring to subdivision (h) of said paragraph IV, and particularly that portion thereof as follows;

"as required by the aforesaid provisions of the laws of the State of Washington,"

that the same be stricken upon the ground and for the reason that the same is irrelevant, immaterial, not applicable

to the cause of action sought to be alleged herein and is a mere conclusion of law.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendant Industrial Brown Hoist Corporation, 412 Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorneys for Plaintiffs.

[File endorsement omitted.]

[fol. 9] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

DEMURRER—Filed Sept. 2, 1932

Comes now the defendant, Industrial Brown Hoist Corporation, and demurs to the complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

V

That there is a defect of parties defendant.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendant Industrial Brown Hoist Corporation, 412 Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 10] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

MOTION TO STRIKE—Filed Sept. 3, 1932

Comes now the defendant, R. W. Kaltenbach Corporation, and moves against the complaint herein as follows:

I

Referring to paragraph IV of the complaint, this defendant moves that the court strike therefrom all of the subdivision (a), and each and every part thereof, upon the ground and for the reason that the same is irrelevant, immaterial and has no application whatsoever to the cause of action sought to be alleged in said complaint.

II

Referring to said paragraph IV this defendant further moves to strike subdivision (b) thereof, and each and every part of said subdivision, upon the ground and for the reason that the same constitutes solely a conclusion of law, and is not an allegation of any fact, and upon the further ground that the same is irrelevant and immaterial and not applicable to the cause of action sought to be alleged in said complaint.

III

In the alternative, and only in the event the foregoing motion II is denied, this defendant further moves that the court require the plaintiff to make said subdivision more definite and certain by stating therein and specifying particularly the safety device, practices, means, methods and/or processes which the defendants are alleged to have failed and neglected to provide, furnish, adopt or use, or in the alternative to furnish said particulars and specifications by way of a bill of particulars.

IV

Referring to subdivision (h) of said paragraph IV, and particularly that portion thereof as follows:

"as required by the aforesaid provisions of the laws of the State of Washington,"

that the same be stricken upon the ground and for the reason that the same is irrelevant, immaterial, not applicable to the cause of action sought to be alleged herein and is a mere conclusion of law.

J. Speed Smith & Henry Elliott, Jr., Attorneys for
[fol. 11] Defendant R. W. Kaltenbach Corporation,
412 Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 12] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

DEMURRER—Filed Sept. 2, 1932

Comes now the defendants, R. W. Kaltenbach Corporation, and demurs to the complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

V

That there is a defect of parties defendant.

J. Speed Smith & Henry Elliott, Jr., Attorneys for
Defendant R. W. Kaltenbach Corporation, 412
Dexter Horton Building, Seattle, Washington.

Copy of foregoing received August 31, 1932.
Wm. Martin, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 13] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

ORDER SUSTAINING DEMURRER—Filed Sept. 21, 1932

This cause coming on duly and regularly for hearing upon the motions and demurrers presented upon behalf of the several defendants herein, and the court having heard the argument of counsel for said defendants respectively, and of counsel for the plaintiffs, and being fully advised, it is now by the court

Ordered and adjudged that said demurrers, and each of them, be and hereby are sustained, and that said motions, and each of them, be and hereby are granted, to which rulings, and each of them, the plaintiffs except and said exceptions be and hereby are allowed; and it is further

Ordered and adjudged that the plaintiffs have ten days from the date hereof to plead further.

Done in open court this 21 day of September, 1932.

H. G. Sutton, Judge.

O. K. as to form.

Wm. Martin, Attorneys for Plaintiffs.

Presented by—

Chas. L. Conley, Attorney for Defendants.

[File endorsement omitted.]

[fol. 14] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

AMENDED COMPLAINT—Filed Sept. 27, 1932

Plaintiffs for complaint against the defendants and each of them allege:

I

That the plaintiff, Maxine Murray, is the widow of Louis Henry Murray, the decedent hereinafter mentioned, and the guardian ad litem of Maxine Lois Murray, a minor, the daughter of the said Louis Henry Murray, deceased, and

the plaintiff Maxine Murray, and brings this action for and on behalf of herself and their said minor child.

II

That the defendant Joe Gerrick & Company is a corporation organized under the laws of the State of California and doing and transacting business at Seattle and Bremerton, Washington; that the defendant Industrial Brown Hoist Corporation is a corporation organized under the laws of the State of Michigan, doing and transacting business at Seattle and Bremerton, Washington; and that the defendant R. W. Kaltenbach Corporation is a corporation organized under the laws of the State of Ohio, doing and transacting business at Seattle and Bremerton, Washington.

[fol. 15]

III

That on or about the 1st day of October, 1931 the defendant R. W. Kaltenbach Corporation entered into a contract with the United States of America through the Chief of the Bureau of Yards & Docks, acting under the direction of the Secretary of the Navy, for the construction of a 20-ton traveling steel tower crane at the Puget Sound Navy Yard at Bremerton, Washington, under the terms and conditions of which the said R. W. Kaltenbach Corporation was to provide all the work, labor and materials used upon and in the construction of said crane and deliver the same complete within the Navy Yard on or before the 30th day of July, 1932 for the sum of Fifty Five Thousand Dollars ($55,000).

IV

That said contract containing all the terms and conditions, drawing and specifications for the construction of said crane as aforesaid is within the possession of the defendants, and the plaintiff is therefore unable to further describe the same other than that one of the terms and conditions of said contract provided:

"The contractor (that is, the defendant R. W. Kaltenbach Corporation) shall give his personal superintendence to the work or have a competent foreman or superintend-

ent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him."

V

That the defendant R. W. Kaltenbach Corporation employed, hired and contracted with the defendant Industrial Brown Hoist Corporation to furnish the work, labor and materials used in the construction of said crane, and the defendant Industrial Brown Hoist Corporation employed, hired and contracted with the defendant Joe Gerrick & Company to hire and employ the said Louis Henry Murray to work upon and in the construction of said crane as a structural steel worker for said defendant corporations, and who was at all times under the supervision, direction and orders of each of them.

[fol. 16]

VI

That the defendant corporations and each of them in the construction of said 20-ton tower crane as aforesaid employed the defendant Max Bloomenstein and the defendant F. W. Corning as their superintendents and foremen and who were in charge thereof as vice-principals of each of the defendant companies, and who then and there were in charge of and supervising the construction of said tower crane, and under whose orders and directions Louis Henry Murray herein mentioned was.

VII

That at Seattle, Washington, on or about the 17th day of June, 1932 Louis Henry Murray entered into the employment of the defendants as a structural steel worker at a wage of $1.10 per hour, time to start when he left Seattle and to continue until he returned; and on said date commenced to work for the defendants upon said 20-ton steel tower traveling crane within the Puget Sound Navy Yard at Bremerton, Washington; and, while so engaged, at about the hour of 11:30 a. m. on June 21, 1932, fell from said steel crane a distance of about 25 feet, fracturing and crushing his skull and otherwise seriously damaging and injuring his body, from which injuries he died at Bremerton, Washington on the 22nd day of June, 1932, leaving the plaintiff Maxine Murray, his widow, and the plaintiff

Maxine Lois Murray, his only child, a minor three years of age, surviving.

VIII

That the injuries sustained by the said Louis Henry Murray, and from which he died as aforesaid, were caused solely by and through the carelessness and negligence of said defendants and each of them as follows:

(a) That the defendants and each of them carelessly and negligently failed and neglected to provide the said [fol. 17] Louis Henry Murray with a reasonably safe place in which to work and to perform his work at the time at which he was injured and killed as aforesaid, and as required by Sections 3515-2-3-4 Pierce's Code of the Laws of the State of Washington, which read:

"Sec. 3515-2. 'Place of Work' Defined.—The phrase 'place of work' shall mean and include every place, whether indoors or out, or underground or elsewhere, and the premises appurtenant thereto, where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation directly or indirectly relating to any industry, trade, work or business is carried on, including all construction work."

"Sec. 3515-3. 'Safety,' etc., Defined.—The terms 'safe' and 'safety,' as applied to an employment or place of work; 'safeguard' or 'safety device' shall mean such freedom from danger to the life or safety of workmen as the nature of the case will reasonably permit; and the two latter terms shall be given a broad interpretation so as to include any reasonable practical method of mitigating or preventing danger."

"Sec. 3515-4. Duty of Employer.—For the purposes of this act, it shall be the duty of every employer to furnish a place of work which shall be as safe for workmen therein as may be reasonable and practicable under the circumstances, surroundings and conditions, and to furnish and use such safety devices and safeguards and to adopt and use such practices, means, methods, operations and processes as under the circumstances, surroundings and conditions are reasonable and practical in order to render the work and place of work safe, and to comply with such

standards of safety of place of work and such safety devices and safeguards and such standards and systems of education for safety as shall be from time to time prescribed for such employer by the State Safety Board, or by statute, or by the State Mining Board."

or at all.

(b) That the defendants and each of them carelessly and negligently failed and neglected to provide, furnish or use any safety device, or to adopt and use the same as required by said statutes, and failed and neglected to adopt and use such practices, means and methods or operation and processes as under the circumstances, surroundings and condition were reasonable and practical in order to render the work and place of work safe, as required by said statutes, or at all.

[fol. 18] (c) That the defendants and each of them carelessly and negligently allowed and permitted pieces of loosely coiled rope and other debris to lay and remain upon the steel structural beams upon which the said decedent was required to go, walk, and work while performing his work upon said crane.

(d) That the defendants and each of them carelessly and negligently caused the structual steel beams and parts of said crane to be heavily covered and painted with red, greasy oil lead, making the steel used in the construction of said crane and upon which said Louis Henry Murray was required to work slippery, dangerous and difficult to hold onto and stand on when working thereon.

(e) That the defendants and each of them carelessly and negligently failed to furnish and provide a fit, safe and suitable platform with a railing, rope or any other device around the same so as to prevent the said Louis Henry Murray from falling therefrom, off or over the same while working on the construction of said crane, and carelessly and negligently failed and neglected to provide a platform constructed as aforesaid close up to, under and adjacent to where the decedent was required to perform his work while "bucking up" (placing, driving and fastening the rivets through and joining the steel beams and parts of said crane together), and on which the said Louis Henry Murray while

so working could stand in the performance of the work which he was required to do; so that in case the said Louis Henry Murray lost his balance or hold while working as aforesaid or happened to slip or lose his footing while engaged in his work, he could catch hold thereof, step upon or fall upon and thus save himself from falling to the ground as aforesaid.

(f) That it was the duty of the defendants and each of them to furnish and provide a safe and suitable platform of sufficient width, with lines, railing, or other device thereon, for the said Louis Henry Murray to stand upon while performing his work upon said crane at a distance of about 25 [fol. 19] feet from the ground, so as to prevent him from falling therefrom; and it was their further duty to direct that said platform be available for use while the said Louis Henry Murray was so working, which said duties the defendants and each of them carelessly and negligently failed and neglected to do and perform.

(g) That while the said Louis Henry Murray was going about and performing his work upon said crane, as aforesaid, in a cautious and careful manner, he reached for an iron bar with which to hold against a rivet as it was being riveted in place, and while so doing slipped from a flange on a steel beam on which he was working and, in attempting to grasp ahold of said beam, he was prevented from so doing by a loose coil of rope lying on top thereof, and as he fell he endeavored to grasp ahold of said platform in order to save himself from falling to the ground, but on account of the same being narrow and carelessly and negligently placed close in to the side of the frame of said crane at a distance of about 5 feet below where the said Louis Henry Murray was required to work and was without any railing or line thereon to grab hold of, he was unable to grasp the same and was unable to save himself thereby from falling to the ground (a distance of about 25 feet) and sustaining the injuries from which he died, as aforesaid; all on account of the carelessness and negligence of the defendants and each of them as aforesaid.

(h) That said platform provided by the defendants and each of them as aforesaid was what is known as a hanging platform, and was too heavy and could not be raised or

lowered with the falls provided therefor by the defendants without very great difficulty; and that the defendants and each of them were further guilty of carelessness and negligence in not providing falls with sufficient purchase and with a platform of proper weight so that the platform could [fol. 20] be raised or lowered readily and conveniently by the said Louis Henry Murray and the other workmen when necessary in carrying on their work in constructing and erecting said crane as aforesaid.

(i) That had said defendants furnished a safe and suitable platform for the said Louis Henry Murray to stand upon in performing his work upon said crane, with the lines, railing or other device thereon so as to protect and prevent the said Louis Henry Murray from falling to the ground while engaged at his work, the said Louis Henry Murray would not have fallen to the ground and been killed as aforesaid.

IX

That the work in which the said Louis Henry Murray was engaged upon and in constructing said tower crane was extra-hazardous work and known to be such by the defendants and each of them at the time at which they employed the said Louis Henry Murray to work thereon as aforesaid.

X

That neither of the defendants did, before so commencing work on the construction of said tower crane, notify the Director of Labor & Industries of such fact and accompany such notification with an estimate of its payroll for the first calendar month of its proposed operations and make payment of the premium on such estimated payroll; and that each of the defendants failed to furnish, on or before the 15th of each month while said work of constructing said tower crane was in progress, a true and accurate payroll or any payroll showing the aggregate number of work days (that is men-days) during which workmen were employed by each of the defendants during the preceding calendar month, the total amount paid to such workmen during such preceding calendar month, and a segregation of employment in the different classes, and failed to pay its premium thereon or any part thereof to the accident fund and medi-

cal aid fund of the Industrial Insurance Department of the State of Washington or at all.

[fol. 21]

XI

That while the defendants and each of them were in default as aforesaid and were all while engaged in this state in carrying on said extra-hazardous work of building and constructing said 20-ton steel tower traveling crane as aforesaid, the said Louis Henry Murray fell therefrom while working thereon and was injured and killed as aforesaid, leaving the plaintiffs, Maxine Murray and Maxine Lois Murray, his sole beneficiaries and dependents, and who are prosecuting this action as such to recover therefor.

XII

That at the time of the death of the said Louis Henry Murray, he was a strong, young, healthy, active man, thirty (30) years of age, with a reasonable life expectancy of 35.33 years as shown by the American Mortality Tables, a skilled steel constructural worker earning and capable of earning a wage of $8.80 per day of 8 hours, and in normal times of obtaining almost constant employment and would have been able to continue to earn said sum of $8.80 per day or more for the full period of said 35.33 years. That, from the time the said Louis Henry Murray fell and was injured until the time of his death, he suffered extreme and excruciating pain and agony.

XIII

That the said Louis Henry Murray left surviving his widow, the plaintiff Maxine Murray, and the plaintiff Maxine Lois Murray, three (3) years of age, who were wholly dependent upon the earnings of the said Louis Henry Murray for their livelihood, and that by his death they have lost their sole means of support and maintenance, his further earnings, accumulations, his foresight and management, and have been deprived of his love, comfort, society, advice, counsel and foresight as a husband and father, and that the plaintiff Maxine Murray, in her own right and as [fol. 21a] guardian ad litem for the said Maxine Lois Murray, has been injured, damaged and sustained a loss in

the premises by reason of the carelessness and negligence of the defendants and each of them as herein alleged in the full sum of Twenty Seven Thousand Five Hundred Dollars ($27,500), no part of which has been paid although frequently demanded.

Wherefore plaintiffs demand judgment against the defendants and each of them in the full sum of Twenty Seven Thousand Five Hundred Dollars ($27,500), together with their costs and disbursements of this action.

Wm. Martin, Attorney for Plaintiffs.

Duly sworn to by Maxine Murray. Jurat omitted in printing.

[fol. 21b] Copy of foregoing Amended Complaint received this 26th day of September, 1932.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendants Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein. Stephen O. Carey, Attorney for Joe Gerrick & Co. and F. W. Corning, Defendants.

[File endorsement omitted.]

[fol. 22] In Superior Court of Kitsap County

[Title omitted]

Demurrer—Filed Oct. 4, 1932

Come now the defendants, Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation and Max Bloomenstein and demur to the amended complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against these defendants.

V

That there is a defect of parties defendant.

VI

That separate causes of action have been improperly joined in said amended complaint.

J. Speed Smith & Henry Elliott, Jr., Attorneys for Defendants, Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein, 412 Dexter Horton Building, Seattle, Wash.

Copy of foregoing received October 3, 1932.
Wm. Martin, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 23] In Superior Court of Kitsap County

[Title omitted]

Demurrer—Filed Oct. 8, 1932

Come now the defendants, Joe Gerrick & Company and F. W. Corning, and demur to the amended complaint of the plaintiffs upon the grounds and for the reasons:

I

That the court has no jurisdiction of this action.

II

That neither of the plaintiffs has any legal capacity to sue.

III

That there is a defect of parties plaintiff.

IV

That the complaint does not state facts sufficient to constitute a cause of action against these defendants.

V

That there is a defect of parties defendant.

VI

That separate causes of action have been improperly joined in said amended complaint.

Stephen V. Carey, Attorney for Defendants Joe Gerrick & Company and F. W. Corning.

Copy received this 4th day of October, 1932.
Wm. Martin, Attorney for Plaintiffs.

[File endorsement omitted.]

[fol. 24] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

MEMORANDUM OPINION—Filed Nov. 16, 1932

After reading the briefs of counsel and the cases cited, I am convinced that the case of State ex rel. Grays Harbor Construction Company v. Department of Labor and Industries, 67 Wash. Dec. 408, is decisive of the facts here pleaded. From the reasoning in that case necessarily follows the corollary that had the United States assumed full control and jurisdiction over the Rainier National Park prior to the passage of the Workmen's Compensation law, the case would have been decided adversely. Since it appears an unquestioned fact in this case that the Federal Government did acquire full control over the Bremerton Navy Yard prior to the passage of the Act, it follows that the Act can not and does not apply. Therefore the demur-

rer will be sustained. Furthermore, I can not see that the federal statute passed by Congress in 1928 has any reference whatever to the Workmen's Compensation Acts of the various states. Its language precludes any such opinion.

There remains only the question of what right of action, if any, arises from the wrongful death of Murray, and who is the proper party to maintain it. Even without the Federal Act of 1928 there would still be a right of action for the wrongful death of Murray, under the laws of this state passed many years ago. Originally that right was enforced by the persons directly interested, such as the wife and chil-
[fol. 25] dren, but in 1917 the legislature provided that such an action must be brought by the personal representative of the deceased, and a number of reasons supporting the wisdom of this amendment occur to me. The Federal Act of 1928 preserved this right as it then existed in this state. Therefore, under the Court's view of the matter, only the personal representative of the deceased, Murray, has a right to bring an action in the state courts based upon any negligence of the defendants.

The demurrer to the complaint must therefore be sustained on two grounds: First, it does not state a cause of action under the Workmen's Compensation Act because this Act does not apply; second, there is a defect of parties plaintiff on any cause of action that is attempted to be stated on the ground of negligence.

H. G. Sutton, Judge.

Dated this 16th day of November, 1932.

[File endorsement omitted.]

[fol. 26] IN SUPERIOR COURT OF KITSAP COUNTY

[Title omitted]

JUDGMENT—Filed Nov. 22, 1932

This cause came on for hearing before the Honorable H. G. Sutton, Judge, upon the demurrer of the defendants to plaintiffs' amended complaint. William Martin, Esq., attorney, appeared for plaintiffs; Stephen V. Carey, Esq., and Roy E. Bigham, Esq., Attorneys, appeared for the de-

fendants Joe Gerrick & Company and F. W. Corning; and J. Speed Smith, Esq., and Henry Elliott, Jr., Esq., attorneys, appeared for the defendants Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein. The demurrer was argued and submitted to the Court upon briefs of the respective parties. After due consideration of the same, the Court rendered and filed its memorandum opinion thereon sustaining defendants' demurrer upon the grounds and for the reasons stated in its memorandum opinion, to which objections and exceptions were duly taken by the plaintiffs to each and every of the Court's rulings therein, which exceptions were duly allowed.

Thereupon the plaintiffs announced that they elected to stand upon their amended complaint and refused to plead further. Whereupon defendants moved for the dismissal of the plaintiffs' complaint, which motion was by the Court granted, to which plaintiffs excepted and their exceptions were allowed.

It is therefore, on motion of defendants, ordered that judgment be entered in accordance therewith.

[fol. 26½] Wherefore it is hereby ordered, considered, and decreed that the above entitled action be and the same is hereby dismissed with costs to defendants, to which plaintiffs except and their exception is allowed.

Done in Open Court this 22 day of November, 1932.

H. G. Sutton, Judge.

O. K. as to form.
Stephen V. Carey & R. E. Bigham, Atty. for Joe Gerrick & Co. and F. W. Corning.

O. K. as to form.
J. Speed Smith & Henry Elliott, Jr., Attorneys for Brown Hoist Corp., R. W. Kaltenbach Corporation, and Max Bloomenstein.

[File endorsement omitted.]

[fol. 27] IN SUPERIOR COURT OF KITSAN COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed Nov. 25, 1932

To the above-named defendants, Joe Gerrick & Company and F. W. Corning, and to their attorneys, Stephen V. Carey, Esq., and Roy E. Bigham, Esq.:

To the above-named defendants, Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein, and to their attorneys, J. Speed Smith, Esq., and Henry Elliott, Jr., Esq.:

You and each of you will please take notice that the plaintiffs, Maxine Murray on her own behalf and as Guardian Ad Litem of Maxine Lois Murray, a minor, feeling aggrieved at the judgment entered in the above numbered and entitled action and court by the Hon. H. G. Sutton, Judge, signed and filed with the clerk on the 22nd day of November, 1932, in favor of the defendants and against the plaintiffs, do hereby appeal from each and every part of said judgment and decree and all rulings, orders, findings, conclusions, steps and proceedings had in said cause to the Supreme Court of the State of Washington.

Dated this 23rd day of November, 1932.

Wm. Martin, Attorney for Plaintiffs.

We hereby acknowledge receipt of a copy of the foregoing notice of Appeal this 23rd day of November, 1932.

Stephen V. Carey, Attorneys for Joe Gerrick & Company and F. W. Corning, Defendants. J. Speed Smith & Henry Elliott, Jr., Attorneys for Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, and Max Bloomenstein, Defendants.

[File endorsement omitted.]

[fols. 28 & 29] Bond on appeal for $200, approved and filed November 25, 1932, omitted in printing.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 31] IN SUPREME COURT OF WASHINGTON, DEPARTMENT TWO

No. 24301

MAXINE MURRAY, on Her Own Behalf and as Guardian ad Litem of Maxine Lois Murray, a Minor, Appellants,

v.

JOE GERRICK & COMPANY, INDUSTRIAL BROWN HOIST CORPORATION, R. W. Kaltenbach Corporation, F. W. Corning, Irving Gottheim, and Max Bloomenstein, Respondents

OPINION—Filed March 24, 1933

This action was brought to recover damages for wrongful death. To the complaint a demurrer was interposed and sustained. An amended complaint was filed and a demurer to that was likewise interposed and sustained. The plaintiff elected to stand upon the amended complaint and refused to plead further. Judgment was entered dismissing the action, from which she appeals.

The facts, as stated in the amended complaint, so far as they are necessary to present the questions here for determination, may be summarized as follows: On or about October 1, 1931, the respondent R. W. Kaltenbach Corporation entered into a contract with the United States Government for the construction of a twenty ton traveling steel tower crane at the Puget Sound Navy Yard at Bremerton, this state. The Kaltenbach corporation contracted with the Industrial Brown Hoist Corporation to furnish the work, labor and materials used in the construction of the crane. Louis Henry Murray was employed to work upon, and in the construction of, the crane as a structural steel worker.

On or about June 17, 1932, Murray entered into the [fol. 32] employment as such steel worker at a wage of $1.10 per hour; the time to start when he left Seattle where the contract of employment was made, and the time was to continue until he returned there. Murray began the work for which he was employed, and while so engaged on June 21, 1932, he fell from the steel crane a distance of about twenty-five feet and sustained injuries from which

he died within a day or two thereafter, leaving the appellant Maxine Murray, his widow, and Maxine Lois Murray, his only child, a minor three years of age, surviving.

Negligence is charged in a number of particulars, and it is further alleged that the work in which Murray was engaged was extra-hazardous. The employers of Murray had not paid to the state director of labor and industries the premium upon its estimated payroll. By the allegations of the amended complaint, it is sought to state a cause of action under the industrial insurance law of this state where the employer has not given notice to the department of labor and industries and paid the premiums upon his estimated payroll.

The industrial insurance act of this state (laws of 1911, chapter 74) was passed a number of years subsequent to the time this state, by legislative enactment, gave its consent to the acquisition of the Puget Sound Navy Yard by the Federal government and ceded exclusive jurisdiction thereto.

The first question to be determined is whether the industrial insurance act extends over the navy yard, which is subject to the jurisdiction of the Federal government.

In State ex rel. Grays Harbor Construction Co. v. Department of Labor & Industries, 167 Wash. 507, 10 P. (2d) 213, it was held that exclusive Federal jurisdiction over Rainier National Park having been acquired through con- [fol. 33] sent of the state subsequent to the passage of the state industrial insurance act, which was in force within the boundaries of the park at the time jurisdiction was ceded, the act remained in force as to private rights within the park until such time as Congress passed an act which superseded it. In the course of the opinion, it was said:

"Prior to the time that the governor of this state was so notified, and in the year 1911, the workmen's compensation act was passed. At that time, the cession of the jurisdiction over the park area to the Federal government had not become effective, and did not become effective until approximately five years later. The Federal jurisdiction over the park area not having become effective when the workmen's compensation act was passed, that act was in force and operative within the boundaries of the park. The workmen's compensation act having been passed be-

fore the cession of the jurisdiction over the park area became effective, it remained in force in the ceded territory until displaced by Congress. [Citing authorities.]"

From the holding in that case, it necessarily follows that the jurisdiction of the Federal government over the navy yard having become effective by consent of the state prior to the passage of the industrial insurance act, that act would not extend to the navy yard unless the Federal Congress should pass an act which would so extend it; and it is contended that this is what Congress has done.

In 1928, Congress passed an act (United States Statutes at Large, Vol. 45, Part 1, p. 54) the title of which was as follows:

"An Act concerning actions on account of death or personal injury within places under the exclusive jurisdiction of the United States."

In the body of the act it was provided that in the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the jurisdiction of the United States, within the exterior boundaries of any state, "such right of action shall exist as though the place were under the jurisdiction of [fol. 34] the state within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the state within the enterior boundaries of which it may be." It will be observed that by this act, in the body thereof, it says "such right of action", which means the actions mentioned in the title concerning death or injury within places under the exclusive jurisdiction of the United States which are within the exterior boundaries of any state.

Section 1 of the industrial insurance act, as passed in 1911, after making certain recitals, provides:

"The State of Washington therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclu-

sion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Here is a provision which expressly abolishes all civil actions and civil causes of action for personal injuries in extra-hazardous work, except as provided therein. There is nothing in the language of the Federal act which would indicate an intention on the part of Congress to extend the industrial insurance act over the navy yard, which is subject to the exclusive jurisdiction of the United States and within the exterior boundaries of this state. Had such been the intention, Congress, undoubtedly, would have plainly so indicated. The case of International Stevedoring Co. v. Haverty, 272 U. S. 50, would not support a construction of the act of Congress here involved, which would [fol. 35] extend the industrial insurance act over the navy yard. In that case, the court construed the Federal marine act of June 5, 1920, which used the word "seaman", to include "stevedores", because they were engaged in the same marine duties.

As already pointed out, the industrial insurance act has taken away all right of action except that therein provided for, and the Federal act refers to rights of action. It is true that the industrial insurance act contains a provision that, if the employer does not pay into the industrial insurance fund and an injury occurs to a workman while the employer is so in default, the action may be brought by the injured employe against the employer, and the common law defenses shall not be available. If it should be held that under this provision of the act an action could be maintained for an injury occurring in the navy yard, which is subject to the exclusive jurisdiction of the United States, then we would have a situation where a part of the industrial insurance act would extend to the navy yard and a part would not.

There is no question but that an action may be maintained under the law as it existed in this state at the time the Federal government acquired jurisdiction over the navy yard, since Congress, so far as we are informed, has passed no act which has displaced that law in the ceded territory.

In neither of the cases of Hilding v. Department of Labor and Industries, 162 Wash. 168, 298 Pac. 321, and Nickell v. Department of Labor and Industries, 164 Wash. 589, 3 P. (2d) 1005, was the question here presented considered or decided. We are of the view that the amended complaint did not state a cause of action under the industrial insurance law. Whether it stated a cause of action under the [fol. 36] law at the time jurisdiction over the navy yard was ceded to the United States, it is not necessary here to determine.

The next question is whether the action was brought in the name of the proper party. As already appears, it was brought by the widow in her individual capacity and as guardian ad litem for the minor child. It was not brought as administratrix of the estate of the deceased or in a representative capacity. In section 1, chapter 123, laws of 1917, it is provided that, when the death of a person is caused by the wrongful act, neglect or default of another, "his personal representative may maintain an action for damages against the person causing the death; * * *" Construing this statute in Broughton v. Oregon-Washington Railroad and Navigation Co., 137 Wash. 135, 241 Pac. 963, it was held that actions for damages for wrongful death must be brought by the personal representative of the deceased. It was there said:

"If it be assumed that the action was brought under state statutes, we are of the opinion that the court's decision was right upon the ground of the incapacity of appellants to bring the action. Section 183, Rem. Comp. Stat., provides that all actions for damages against a person causing the death of another shall be brought by the personal representative of the deceased. We have had occasion to construe this statute on many occasions to this effect. Machek v. Seattle, 118 Wash. 42, 203 Pac. 25; Howe v. Whitman County, 120 Wash. 247, 206 Pac. 968; Castner v. Tacoma Gas & Fuel Co., 123 Wash. 236, 212 Pac. 283."

Cases holding to the effect that the objection that the action is not brought in the name of the proper party must be timely made are of no controlling importance here, because in this case the respondents raised the question upon their first appearance and continued to insist upon it. Attention is called to Rule II, 140 Wash. p. xxv-xxxvi; but

there is nothing in that rule which would sustain the right to maintain the action by a person other than the repre-
[fol. 37] sentative of the deceased.

The judgment will be affirmed.

Main, J.

We concur:

Beals, C. J. Tolman, J. Blake, J. Steinert, J.

[fols. 38–45] Petition for rehearing, covering eight pages, omitted from this print. It was denied and nothing more by order, May 11, 1933.

[fol. 46] In Supreme Court of Washington

[Title omitted]

Order Denying Petition for Rehearing Filed May 11, 1933

The court having considered the appellant's petition for a rehearing herein,

It is ordered that the said petition, be, and it hereby is, denied.

Dated this 11 day of May, 1933.

By the Court:

Mitchell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 47] In Supreme Court of Washington

No. 24301

Maxine Murray, on Her Own Behalf and as Guardian ad Litem of Maxine Lois Murray, a Minor, Appellant,

vs.

Joe Gerrick & Co., Industrial Brown Hoist Corporation, et al., Respondents

Judgment—May 12, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Kitsap County, and upon the argument of counsel, and the court having fully considered the same, and being fully

advised in the premises, it is now, on this 12th day of May, A. D. 1933, on motion of J. Speed Smith, Henry Elliott, Jr., Stephen V. Carey, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby, affirmed, with costs; and that the said Respondents have and recover of and from the said Maxine Murray and from Fidelity & Deposit Co. of Maryland, surety, their costs, as follows: Industrial Brown Hoist Corporation, R. W. Kaltenbach Corporation, & Max Bloomenstein, $68.30; Joe Gerrick & Co. the costs of this action, taxed and allowed at Thirty & 50/100 Dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance herewith.

[fol. 48] IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To the clerk of the above-entitled court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;

The opinion of the Supreme Court of the State of Washington;

All journal entries contained in the record and proceedings of the Supreme Court of the State of Washington relating to said cause; Petition for Rehearing.

The final judgment and decision of the Supreme Court of the State of Washington;

A copy of this præcipe;

Your certificate to the record that it is a complete record in said cause.

Dated this 19th day of July, 1933.

Wm. Martin, Attorney for Appellants.

Address: 611 Lowman Building, Seattle, Washington.

[fol. 49] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4051)